Supreme Court, U.S.
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No. 94-1079

In The Supreme Court of the United States

October Term, 1994

United Technologies Corporation and
BASF Corporation,
Petitioners,

v.

Browning-Ferris Industries, Inc., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BFI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' action to recover a share of the response costs incurred under a consent decree that resolved a common liability to the federal and state governments was an "action for contribution," and thus barred by the statute of limitations governing actions for contribution in § 113(g)(3)(B) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9613(g)(3)(B).

STATEMENT REQUIRED BY RULE 29.1

Browning-Ferris Industries, Inc. ("BFI") is not a subsidiary of a publicly-held corporation. A subsidiary of BFI, Atwoods P.L.C., is a United Kingdom company with shares traded on the New York Stock Exchange and London Stock Exchange. No other subsidiary of BFI has issued shares to the public.

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BFI'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case presents the narrow question whether petitioners' claim is an action for "contribution." If so, it is barred by the statute of limitations in § 113(g)(3)(B) of CERCLA which expressly states that "*no action for contribution*" for "*any*" response costs may be brought more than three years after entry of consent decree regarding such costs. That narrow question does not present any issue that merits review by this Court.

Under a 1986 federal court consent decree, Inmont Corporation ("Inmont"), petitioners' predecessor, settled the claims of the federal and state governments concerning the Winthrop Landfill ("Site") and assumed in full a common liability to pay for and perform the govern-

ment-selected clean-up of the Site. Rather than file suit promptly, petitioners slept on their rights and waited six years to seek to recover the response costs they claimed exceeded their fair share of the total cleanup cost.

Applying basic canons of construction, the First Circuit reasonably and correctly found the petitioners' action was one "for contribution" and hence barred by § 113 (g)(3)(B). The unsurprising determination that petitioners' action is "for contribution" is consistent with decisions of other courts of appeals which agree that regardless of the statutory provision invoked, an action by one potentially responsible party ("PRP") against another PRP for cleanup costs incurred under a settlement with the government is "for contribution." Moreover, the decision is the first in which an appellate court has applied the plain language of § 113(g)(3)(B) to an action under CERCLA and hence does not present a conflict for review. In all events, the court's reasoning is sound and does not conflict with this Court's decision in *United States* v. *Key Tronic* or with any of the policies underlying CERCLA.

Factual Background—In 1985, the United States Environmental Protection Agency ("EPA"), having notified Inmont in 1982 that it considered Inmont liable under CERCLA (J.A. A-18), offered Inmont the opportunity to resolve its liability and assume responsibility for the cleanup.[1] Negotiations ensued, and Inmont and three other persons notified by EPA agreed to resolve the governments' claims concerning the Site in full in a Consent Decree. The Decree required Inmont to pay the government past response costs, future government costs, and other response costs by conducting EPA's cleanup. *Id.* at A-52-56. To lodge the Decree, the governments filed initial actions under CERCLA §§ 106 and 107 alleging Inmont and the other settlors were jointly and severally liable to remediate the Site and reimburse government response

[1] BFI has never been notified by EPA that it is a PRP.

costs. Upon entry of the Decree on March 23, 1986, petitioners assumed the common liability for the cleanup of the Site.

District Court Proceedings—In October 1992, six and one-half years after the Decree was entered, petitioners filed this suit. The complaint sought to recover from respondents a share of the response costs petitioners had paid and would pay pursuant to the Decree under both § 107 and § 113 of CERCLA.[2] Petitioners styled their § 107 action as "cost recovery" and their § 113 action as "contribution," although both sought to recover the same response costs. *Id.* at A-22, 24. BFI moved for summary judgment arguing petitioners' CERCLA action, whether styled under § 107 or § 113, was in fact simply an action "for contribution" and thus untimely under CERCLA § 113(g)(3)(B). BFI argued that like any "tortfeasor," petitioners had settled a common liability and were simply attempting to recover the costs associated with that settlement from other alleged joint tortfeasors.

The district court agreed. In an opinion written by the Magistrate Judge, and later adopted with limited changes by the District Judge, the court held, based on the plain language of § 113 and basic precepts of contribution, that petitioners' claims were "necessarily claims for contributions." Pet. App. 32a. Citing CERCLA § 113(f)(3)(B), the court reasoned that "a party who has already settled the issue of its own liability with the Government, as is the case here, is thereafter limited in its own future recovery from other potentially responsible parties . . ." *Id.* at 30a-31a.

First Circuit Decision—The First Circuit affirmed. The court held that "contribution" has its traditional meaning under CERCLA, and "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share

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[2] The complaint also sought recovery under state law. Those claims are also pending in a state court action which is stayed.

of the aggregate response costs." *Id.* at 15a. The court based this ruling on the accepted canon of statutory construction that Congress intends a standard term such as "contribution" to have its customary legal meaning (*id.* at 6a), a conclusion confirmed by analysis of CERCLA's plain language and legislative history, and by relevant authorities. *Id.* at 10a. Applying the standard meaning of "contribution" to petitioners' action, the court found it was for contribution, and thus barred by § 113(g)(3).

In so holding, the Court rejected petitioners' theory that they had a separate action to recover the bulk of their response costs in a "cost recovery" action under CERCLA § 107. In order to preserve a role for § 113, petitioners argued Congress created a two-part scheme for recovery of response costs incurred by a private party: one action under § 107 for "cost recovery" to recoup response costs paid to *contractors* to perform an EPA-mandated cleanup, and a distinct action under § 113(f) "for contribution" *solely* for the response costs paid to *EPA*. *Id.* at 11a.[3] The court, however, rejected petitioners' theory as "sleight of hand," without basis in CERCLA or its legislative history, and an "artificial circumscription," contrary to the traditional view of contribution. *Id.* at 12a-13a. The court reasoned that CERCLA § 113(f)(3)(B) expressly authorizes a party who has settled with the government to seek contribution "for some or all of the *response action or* for some or all of the *costs of such action.*" 42 U.S.C. § 9613(f)(3)(B) (emphases added). The

[3] As the First Circuit observed, petitioners were forced to create their scheme solely to "preserv[e] some semblance of utility" for § 113. Pet. App. 11a. If § 107 were read to create a "broad, unqualified" right to recover all response costs, as petitioners argued to the district court, that action would "completely swallow" and subsume any contribution action and render § 113(f) and (g)(3) mere surplusage. *Id.* Relying on the well-established principle that "courts must strive to give effect to each subsection contained in a statute," the court "refuse[d] to follow a course that ineluctably produces judicial nullification of an entire SARA subsection." *Id.*

court concluded that this plain language, amplified by the legislative history, "show[s] beyond serious question that the drafters intended contribution, as that term is used in section 9613," to encompass the costs paid by private parties to perform cleanups. Pet. App. 14a.

Lastly, the court recognized that petitioners' "construction emasculates the contribution protection component of CERCLA's settlement framework." *Id.* As its name implies, "contribution protection" encourages private parties to settle with EPA by providing protection from suit by others and is one of the central tools CERCLA grants EPA to facilitate settlement. The court found this crucial mechanism "would be gutted" if private parties could simply avoid the protection by styling their action for cost recovery. *Id.* at 14a-15a.

REASONS FOR DENYING THE WRIT

The First Circuit's decision that petitioners' action is for "contribution" and hence barred by the express language of § 113(g)(3)(B) does not merit review. Every other appellate court which has considered the question has concluded that actions such as petitioners' are for contribution. In adding to this uniform body of law, the First Circuit soundly based its decision on basic canons of statutory construction, CERCLA's legislative history, and relevant authorities. Further, the First Circuit's decision to apply § 113(g)(3)(B) to petitioners' action also does not pose a conflict, as it is the first in which a court of appeals applied § 113(g)(3) to a CERCLA action. In any event, the court's reasoned interpretation of the plain language of § 113(g)(3)(B), which expressly governs *any* "action for contribution" for "*any* response costs" covered by a consent decree, is amply supported by the statute and contemporaneous legislative history.

Petitioners' attempt to create a conflict between the decision below and this Court's opinion in *Key Tronic* v. *United States*, which did not concern the statute of limita-

tions issue presented here, is baseless. Consistent with the First Circuit's analysis, this Court reasoned in *Key Tronic* that an action by a private party which had incurred cleanup costs under a settlement with the government would in any event be for "contribution."

Finally, petitioners' policy concerns do not justify review. As the First Circuit recognized, it is petitioners' "tortured construction" of CERCLA that would discourage cleanups and gut "contribution protection," the cornerstone of the settlement incentives Congress established in CERCLA. Pet. App. 14a-15a. In short, the policy arguments are an attempt to hide the self-inflicted wound at the core of this petition: petitioners' failure to file suit within three years.

I. THE FIRST CIRCUIT'S DECISION THAT PETITIONERS' ACTION WAS FOR CONTRIBUTION AND BARRED BY CERCLA § 113(g)(3)(B) DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS AND DOES NOT WARRANT REVIEW.

1. The First Circuit correctly held that petitioners' action was for contribution, and as the statute of limitations in § 113(g)(3)(B) unambiguously covers all actions for contribution for *any* response costs covered by a consent decree, petitioners' action was barred. The unsurprising holding that petitioners' action is for "contribution" does not conflict with a decision of any circuit court. The Fifth, Seventh, Ninth and Tenth Circuits have all considered whether an action such as petitioners' is "for contribution" and have uniformly agreed that it is. See *United States* v. *Colorado & E.R.R.*, No. 93-1422, 1994 WL 647329, at *5 (10th Cir. Nov. 17, 1994), *pet. for reh'g filed* (Dec. 12, 1994) ("whatever label" used, PRP who settled with EPA and financed and performed cleanup under settlement was limited to seeking contribution); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (claim by PRPs who had performed the cleanup under an EPA settlement was "a quintessential

claim for contribution"); *In re Dant & Russell, Inc.*, 951 F.2d 246, 249 (9th Cir. 1991) (CERCLA action by one PRP against another was governed by the contribution provisions of § 113); *Amoco Oil Co.* v. *Borden, Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) (action by a PRP who had incurred costs to recover from another its equitable share of the costs was "for contribution"); see also *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (A PRP who settled with EPA may seek contribution for a share of the cleanup cost that exceeded its fair share.). Moreover, a number of district courts have similarly and persuasively reasoned that a PRP's action for response costs incurred performing a cleanup is for contribution.[4] Thus, contrary to petitioners' pleas, there is neither conflict nor "confusion" among the courts for this Court to resolve.

In fact, the First Circuit's determination concerning the nature of petitioners' action is entirely correct. Foremost, consistent with accepted canons of construction, the court found that Congress intended a standard term such as "contribution," not otherwise directly defined, to have its customary legal meaning. Pet. App. 6a. Relying on decisions of this Court and others, the First Circuit reasoned that contribution "refers to an action by a responsible party to recover from another responsible party that portion of its costs that are in excess of its *pro rata* share of the aggregate response costs." *Id.* at 8a, 15a; see

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[4] *United States* v. *Asarco, Inc.*, 814 F. Supp. 951, 956 (D. Colo. 1993); *Ciba-Geigy Corp.* v. *Sandoz Ltd.*, No. 92-4491, 1993 WL 668325, at *6-7 (D.N.J. June 17, 1993); *Avnet, Inc.* v. *Allied-Signal, Inc.*, 825 F. Supp. 1132, 1138 (D.R.I. 1992); *Transtech Indus.* v. *A & Z Septic Clean*, 798 F. Supp. 1079, 1086 (D.N.J. 1992), *appeal dismissed*, 5 F.3d 51 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 2692 (1994); *Ellman* v. *Woo*, 34 Envt. Rep. Cases (BNA) 1969, 1971 (E.D. Pa. 1991); *Versatile Metals, Inc.* v. *Union Corp.*, 693 F. Supp. 1563, 1571 (E.D. Pa. 1988); *Chemical Waste Management, Inc.* v. *Armstrong World Indus.*, 669 F. Supp. 1285, 1291 (E.D. Pa. 1987).

Northwest Airlines, Inc. v. *Transport Workers Union of Am.*, 451 U.S. 77, 87-88 (1981).[5] The First Circuit confirmed its interpretation of the term "contribution" in CERCLA by careful analysis of the statute, its legislative history, and relevant authorities. Pet. App. 7a-10a.

The plain language of CERCLA § 113 confirms the First Circuit's analysis. Section 113(f)(3)(B) expressly provides that an attempt to recover a share of a common CERCLA liability assumed in a settlement was for "contribution." 42 U.S.C. § 9613(f)(3)(B) ("A person who has *resolved its liability* to the United States . . . in an administrative or judicially approved *settlement* may seek *contribution*" from any non-settlor.) (emphasis added). This makes plain that a person who resolves its liability, without a finding of liability, would seek contribution.

The legislative history of the Superfund Amendments and Reauthorization Act of 1986 ("SARA") and pre-SARA caselaw relied on below likewise demonstrate that petitioners' action is for contribution. Prior to SARA, the right of responsible parties to seek contribution from other PRPs was uncertain. Pet. App. 9a; see *Key Tronic Corp.* v. *United States*, 114 S. Ct. 1960, 1965 (1994) (CERCLA originally "contained no express provision authorizing a private party that had incurred cleanup costs to seek contribution from other potentially responsible parties.").[6] Although courts generally found PRPs

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[5] As the First Circuit also noted, this description of a contribution action is recognized in most jurisdictions, *Northwest Airlines*, 451 U.S. at 87 n.17, and Congress directed the federal courts to establish the scope and nature of liability under CERCLA consistent with evolving principles of law. *See* 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph); 126 Cong. Rec. 31,965 (1980) (statement of Rep. Florio); Pet. App. 7a n.7.

[6] Uncertainty prevailed, in part, because this Court had refused to imply rights of action under other statutes absent express direction from Congress. *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 638 (1981); 131 Cong. Rec. 24,450 (1985) (statement of Sen. Stafford, a sponsor of SARA).

who performed a cleanup had an implied right to contribution under CERCLA § 107, see *Key Tronic, supra*,[7] PRPs remained reluctant to clean up CERCLA sites voluntarily. Congress enacted § 113(f) to confirm that a private party performing an EPA cleanup could seek contribution from others. Congress believed this would encourage private parties to settle and perform cleanups. S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985); H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 (PRPs will be more willing to assume responsibility "for cleanup" if assured can seek "contribution" from others); H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042 (describes contribution as "right available to those who have paid more than their equitable share of an entire liability").

In short, the uniform holdings of the courts of appeals, and the language and history of CERCLA, all confirm that petitioners' action is for contribution.

2. The First Circuit is the first court of appeals to apply § 113(g)(3)(B) directly to an action such as petitioners'.[8] As such, on that basis alone, there is clearly no conflict that warrants resolution by this Court.

In any case, the First Circuit correctly applied a reasonable and straightforward interpretation of CERCLA § 113(g)(3)(B) to find petitioners' contribution action

[7] No court found that a potentially responsible party who resolved its liability to the government and performed the cleanup then had an independent right to seek "cost recovery" and obtain a judgment of joint and several liability against another PRP. *E.g., United States* v. *Conservation Chem. Co.*, 619 F. Supp. 162, 229 (W.D. Mo. 1985). None of the cases cited by petitioners is to the contrary. Pet. 23.

[8] The only other appellate court to consider § 113(g)(3)'s applicability to contribution actions has noted that it would apply to an action like petitioners'. *Smith Land & Improvement Corp.* v. *Celotex Corp.*, 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

was barred. Pet. App. 4a-5a. CERCLA § 113(g)(3) provides:

> (3) Contribution—*No action for contribution for any response costs* or damages may be commenced more than 3 years after—
>
> (A) the date of judgment in any action under this Chapter for recovery of such costs or damages, or
>
> (B) the date of an administrative order under section 9622(g) (relating to de minimis settlements) or 9622(h) (relating to cost recovery settlements) or *entry of a judicially approved settlement with respect to such costs* or damages.

42 U.S.C. § 9613(g)(3) (emphases added).

The meaning of this provision is clear. Contrary to petitioners' claim, by use of the phrase "*no* action for contribution," § 113(g)(3)(B) plainly bars *any* action for contribution covered by a judicial consent decree. Further, it expressly covers *any* response costs covered by that decree. There is absolutely no basis for petitioners' faulty conclusion that § 113(g)(3)(B) only applies to actions to recover response costs "paid to EPA," as the statute does not make any such distinction. To the contrary, by its terms, § 113(g)(3)(B) applies, without exception, to *any* response costs covered by the judicial settlement, as the phrase "with respect to such costs" refers back to "any" response costs. The contemporaneous legislative history confirms this plain reading of § 113(g)(3). H.R. Rep. No. 962, 99th Cong., 2d Sess. 223 (1986), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3316 (House Conference Report).[9]

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[9] Petitioners' reliance on the proposed Superfund bill that did not pass the last Congress is misplaced. Pet. 15. The bill they cite never even went to the floor for debate or to conference. The problem with placing any weight upon such a bill is well illustrated by the fact that former Senate Majority Leader Mitchell, a member

In sum, CERCLA § 113(g)(3) is clearly the applicable statute of limitations for petitioners' action for contribution for response costs covered by a judicial consent decree.

3. In response to the First Circuit's reasoned analysis, petitioners again advance the same misguided theory, twice rejected below, that their claim is not for contribution because "contribution" serves the limited purpose of allowing a private party to recover response costs paid to EPA. Pet. 22-23. Petitioners renew this wholly artificial theory because otherwise, if responsible parties who settled a common liability to EPA had an unfettered right to seek "cost recovery" for any response costs under § 107(a), CERCLA § 113(f) and (g)(3) would be mere surplusage. Pet. App. 11a.[10] Yet, CERCLA and its legislative history reject petitioners' cramped understanding of contribution. As the First Circuit found, neither CERCLA § 107 nor the traditional meaning of "contribution" support the theory. *Id.* at 12a-13a. Moreover, § 113(f)(3)(B) is to the contrary.

> A person who has resolved its liability to the United States or the State *for some or all of a response action or for some or all of the costs of such action* in an administrative or judicially approved settlement may seek *contribution* from any other person who is not a party to the settlement . . . .

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of the Senate Environment and Public Works Committee, and a key draftsman of SARA, had proposed numerous amendments to the bill. Among the many amendments he proposed was to confirm that any revisions to § 113(g) would change current law and be applied prospectively only. *See* 8 *Superfund Report* 3, 34-38 (Sept. 21, 1994) (Text of Sen. Mitchell's proposed amendments included proposal to "clarify that the revised statute of limitations provided in the bill apply prospectively only.").

[10] Petitioners created this theory out of whole cloth. Their complaint made no distinction between response costs paid to the government and costs paid to perform cleanup work. J.A. A-22, 24.

42 U.S.C. § 9613(f)(3)(B) (emphases added).[11] This statutory language, on its face, unambiguously demonstrates that Congress intended an action for "contribution" would encompass *both* costs paid directly to the government *and* costs paid by a person who assumed responsibility to perform a cleanup. Pet. App. 13a.

The legislative history confirms this reading of § 113(f)(3)(B). Both Senate and House committees stated that § 113(f) was designed to allow an action for contribution when a person "believes that it has assumed *a share of the cleanup* or cost that may be greater than its equitable share under the circumstances." S. Rep. No. 11, 99th Cong., 1st Sess. 44 (1985) (emphasis added); see H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862 ("Parties who settle for all or part of a cleanup or its costs . . . can attempt to recover some portion of their expenses and obligations in contribution litigation from parties who were not sued in the enforcement action or who were not parties to the settlement."). As the First Circuit held, "[t]hese statements show beyond serious question" that Congress intended contribution would include an action to recover costs paid to perform a cleanup, not just costs paid to EPA. Pet. App. 14a.

II. PETITIONERS' ATTEMPT TO MANUFACTURE A CONFLICT BETWEEN THE JUDGMENT OF THE COURT OF APPEALS AND THIS COURT'S DECISION IN *KEY TRONIC* IS WITHOUT MERIT.

Lacking any split in the circuits, petitioners seek to manufacture a conflict between the judgment below and this Court's opinion in *Key Tronic* v. *United States*, 114 S. Ct. 1960 (1994). This argument is baseless. Peti-

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[11] Other provisions of CERCLA confirm this reading. For example, the definition of "response costs" does not distinguish between costs based on to whom the costs are paid. 42 U.S.C. § 9601(23)-(25).

tioners focus on dicta [12] in *Key Tronic* that states, as a result of SARA, CERCLA "expressly authorizes a cause of action for contribution in § 113 and impliedly authorizes a similar and somewhat overlapping remedy in § 107." 114 S. Ct. at 1966. Petitioners then claim the First Circuit's decision conflicts with that phrase because the court below allegedly found PRPs have no cause of action "under § 107."

Petitioners' argument is a red herring. Contrary to petitioners' blanket assertion, the First Circuit did not find a responsible party could never bring an "action under § 107." The decision below states that in view of the Court's statements in *Key Tronic* an implied right of action for contribution may exist for private parties under CERCLA § 107. Pet. App. 7a n.8; 12a n.10, 16a n.12. What the First Circuit did find was that actions for "contribution and cost recovery are distinct." *Id.* at 15a-16a. It then correctly found that in this case, where the costs were incurred under a consent decree that resolved a common liability to the governments, petitioners' action was for "contribution" and *not* a "cost recovery" claim under § 107. *Id.*[13] As such, the First Circuit concluded, its analysis was consistent with *Key Tronic*'s discussion of "two different species of contribution actions." *Id.* at 16a n.12.

In any event, read in context, *Key Tronic* makes plain that the only "somewhat overlapping" remedy that possibly persists in § 107 is for contribution. *Key Tronic* reasoned that an implied right of contribution survived

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[12] The narrow question presented to the Court in *Key Tronic* was whether attorney's fees incurred outside a settlement were necessary costs of response under CERCLA. 114 S. Ct. at 1963. The Court discussed different actions under CERCLA, but did not consider whether the *Key Tronic* petitioners' action was for "contribution" within the meaning of § 113(g)(3)(B).

[13] Conversely, in *Key Tronic*, the attorney's fees at issue were "incurred before the settlements" and were not part of the common liability assumed in settlements with EPA. 114 S. Ct. at 1963.

SARA because prior to SARA the lower courts had found CERCLA § 107 "to impliedly authorize *such* a cause of action," for contribution under § 107. 114 S. Ct. at 1965 (emphasis added). In SARA, the Court explained, Congress then created an express cause of action for contribution in § 113, but also "appeared to endorse" the decisions pre-supposing the implied right of contribution under § 107. *Id.*[14] Accordingly, at most *Key Tronic* suggests petitioners might conceivably have had an implied action for "contribution" under § 107. But even if that were the case, under the plain language of § 113 (g)(3) such an action would be barred. In any case, because neither the First Circuit nor any other court has ever considered what statute of limitations should apply to that implied contribution action, that issue is not before, and certainly does not merit review by, this Court.[15]

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[14] The majority and dissent debated whether the claim for contribution was express or implied. *E.g.*, 114 S. Ct. at 1966 n.11 ("That § 107 imposes liability on A for costs incurred 'by any other person' *implies* . . . that A may have a claim *for contribution* against those treated as joint tortfeasors.") (emphasis partially supplied). That debate is not implicated here, however, as in either case, petitioners' claim is still for contribution.

[15] Petitioners' further assertion that the First Circuit opinion produces a "result that cannot be reconciled" with the decisions of other courts is equally baseless, as the cited decisions neither decided whether a claim by a person who had resolved a common liability to the government was for contribution nor interpreted CERCLA § 113(g)(3)(B). *See Velsicol Chem. Corp.* v. *Enenco, Inc.*, 9 F.3d 524 (6th Cir. 1993) (whether the action was for contribution was not at issue); *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1417-18 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991) (issue was whether defendant could assert unclean hands defense); *In re Charter Co.*, 862 F.2d 1500, 1503 (11th Cir. 1989) (court did not decide whether costs to perform cleanup where recoverable because none were at issue).

III. PETITIONERS' POLICY REASONS FOR GRANTING REVIEW ARE GROUNDLESS. ON THE CONTRARY, IT IS PETITIONERS' VIEW OF THE STATUTE THAT WOULD FRUSTRATE THE WILL OF CONGRESS.

Lacking a split in the circuits upon which to base their petition, petitioners sprinkle their petition with sweeping statements concerning CERCLA policy, principally asserting the decision will discourage privately funded cleanups. Yet, as the First Circuit explicitly recognized, it is petitioners' view of CERCLA that would discourage private party settlements.

1. Foremost, petitioners' "construction emasculates the contribution protection component of CERCLA's settlement framework" afforded settling parties by CERCLA §§ 113(f)(2) and 122(g)(5). Pet. App. 14a. Without that protection, private parties would have far less incentive to settle promptly and agree to undertake an EPA-selected cleanup.

As the opinion below explained, CERCLA first and foremost seeks to provide EPA with the tools it needs to achieve prompt cleanups. *Id.* (citing *United States* v. *Cannons Eng'g Corp.*, 899 F.2d 79, 90-91 (1st Cir. 1990)). As the cornerstone of EPA's settlement incentives, Congress enacted "contribution protection" under §§ 113(f)(2) and 122(g) of CERCLA. *Id.; Cannons*, 899 F.2d at 92. Under these sections, to induce PRPs to settle with the government, a PRP who settles with the government "shall not be liable for claims *for contribution* regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added), and § 9622 (g)(5) (*de minimis* settlements). This "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." Pet. App. 14a (citing *Cannons,* 899 F.2d at 92); H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2862.

Yet, if petitioners' view of CERCLA were adopted, then the explicit protection afforded PRPs from claims "for contribution" in §§ 113(f) and 122(g) "would be gutted." Pet. App. 14a. PRPs who incurred cleanup costs could simply bring actions against settling parties, style them as § 107 "cost recovery" actions and thereby circumvent contribution protection.[16] The result of these actions would be to "diminish the incentive for parties to reach early settlements with the government" and increase litigation, clearly contrary to Congress's stated statutory goals. *Id.* at 15a; 42 U.S.C. § 9622. As such, petitioners' "tortured construction" of CERCLA was properly rejected below.

2. Petitioners' dramatic assertions that cleanups will be discouraged are simply without merit. Persons who have agreed to perform cleanups will remain obligated to do so. The decision has no effect on those commitments. All the decision means is that those who have settled with EPA or the State will have to file any actions for contribution within three years of settlement, or risk forfeiting their claim.

Moreover, the longer statute of limitations advocated by petitioners will merely serve to extend the already lengthy CERCLA litigation process and deprive parties of reasonable repose. Congress stated a clear preference to bring all private parties into a matter early and for CERCLA actions to be brought promptly to avoid the problems associated with delay, rather than allowing the evidence to grow stale, as petitioners did in this matter. See H.R. Rep. No. 253, 99th Cong., 1st Sess. 80 (1985), *reprinted in* U.S.C.C.A.N. 2835, 2862; S. Rep. No. 11, 99th Cong., 1st Sess. 55 (1985).

Nor will a settlor be disadvantaged if it may not seek "cost recovery." Petitioners' argument is based on a false

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[16] For example, EPA may settle with one group of PRPs to perform part of a cleanup, and then bring suit against another group to perform the rest. Under petitioners' theory, the second group could bring a cost recovery action against the settlors.

premise: that "[s]ection 107(a) cost recovery [acts as] the primary incentive" to encourage PRPs to agree to undertake cleanups. Pet. 12. That is simply not true. If that were the case, cleanups would have abounded before SARA and there would have been no reason for Congress to enact the contribution framework in § 113 in the first place. Yet, as the legislative history makes plain, Congress enacted § 113 because PRPs were *not* settling and to assure that PRPs who agreed to perform the cleanup would be entitled to contribution and protected from future suits.

Moreover, a contribution action among PRPs presents none of the disadvantages asserted by petitioners. To the contrary, liability remains strict, subject to the same limited defenses. The four categories of liable parties under CERCLA are set forth in § 107(a)(1)-(4), and regardless whether the action is for contribution or cost recovery, § 107 will determine who is liable. 42 U.S.C. § 9613(f)(1) (may seek contribution from a person liable "under section 9607(a)"). Then, in a contribution action, as CERCLA § 113(f) explicitly provides, a district court has extremely broad discretion to allocate responsibility among all liable parties on a case-by-case basis, including the so-called "orphan share." *Id.* (court may allocate response costs "using such equitable factors as the Court determines appropriate"); see H.R. Rep. No. 253(III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3041-42 (resolve contribution equitably, on "case-by-case basis"); S. Rep. No. 11, 99th Cong., 1st Sess. 54 (1985).[17] Indeed, early cooperation with the government will not be discouraged, as that is one of the factors courts typically consider. See H.R.

[17] Courts agree the discretion to allocate responsibility among PRPs is broad. *E.g., Environmental Transp. Sys., Inc.* v. *Ensco, Inc.*, 969 F.2d 503, 509 (7th Cir. 1992); *United States* v. *R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991); *see also United States* v. *Stringfellow*, No. 83-2501, 1993 U.S. Dist. LEXIS 19113, at *6 (C.D. Cal. Nov. 30, 1993) (allocating orphan share).

Rep. No. 253 (III), 99th Cong., 2d Sess. 19 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3042; 126 Cong. Rec. 26,781 (1980) (statement of Sen. Gore). In short, after settlement of the government's claims, a court would allocate liability among liable parties on an equitable basis —unless, as was the case here, the contribution plaintiffs failed to bring their actions within three years of settlement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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